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5 UNITED STATES DISTRICT COURT

6 DISTRICT OF NEVADA

7 \* \* \* \* \*

8 UNITED STATES OF AMERICA,

9 Plaintiff,

2:02-cr-00201-LRH-NJK

10 v.

ORDER

11 EDWARD STAIN,

12 Defendant.  
13

14 Before the court is petitioner Edward Stain’s motion to vacate, set aside, or correct his  
15 sentence pursuant to 28 U.S.C. § 2255.<sup>1</sup> ECF No. 404. The court finds that both Hobbs Act  
16 robbery and federal bank robbery are categorically crimes of violence under the “force clause”  
17 under 18 U.S.C. § 924(c). In turn, even if section 924(c)’s “residual clause” is void for  
18 vagueness—a question the court does not reach—Stain is not entitled to relief.<sup>2</sup> The court will  
19 therefore deny his motion but will grant him a certificate of appealability.

20 **I. Background**

21 **A. Stain’s conviction and subsequent proceedings**

22 On February 3, 2006, a jury found Stain guilty of one count of conspiracy to commit  
23 armed bank robbery (count one); two counts of interference with commerce by threats or

24 <sup>1</sup> Because the content of Stain’s motion conclusively shows that he is not entitled to relief, the  
25 court has not ordered the United States to respond. *See* 28 U.S.C. § 2255(b).

26 <sup>2</sup> Before being appointed counsel, Stain filed a *pro se* “motion for reconsideration in sentencing  
27 pursuant to 3742(a)(1) and (2).” ECF No. 384. However, this motion seeks relief under *Johnson*  
28 *v. United States*, 135 S. Ct. 2551 (2015), arguing that Hobbs Act robbery is not a crime of  
violence. Because this is one of the key issues addressed by the section 2255 motion that Stain’s  
counsel filed, the court will consider his *pro se* motion as part of his later section 2255 filing and  
deny it for the same reasons articulated in this order.

1 violence (“Hobbs Act robbery”) (counts two and six); one count of armed bank robbery (count  
2 four), and two counts of possession of a firearm during and in relation to a crime of violence  
3 under 18 U.S.C. § 924(c) (counts three and five). ECF No. 217; *see also* ECF No. 171. On June  
4 13, 2008, the Ninth Circuit Court of Appeals reversed Stain’s conviction only as to the count of  
5 *conspiracy* to commit armed bank robbery and affirmed the remainder of the judgment. ECF  
6 No. 272. On August 28, 2012, the court granted in part and denied in part Stain’s *pro se* section  
7 2255 motion. ECF Nos. 285, 328. The court subsequently entered the second amended judgment  
8 (ECF No. 329), which is the operative judgment in this case.<sup>3</sup>

9 Pursuant to this district’s Amended General Order on April 27, 2016, Stain filed an  
10 “abridged” motion to vacate in order to toll the statute of limitations under section 2255. ECF  
11 No. 397. He subsequently filed a timely full motion to vacate, set aside, or correct his sentence.  
12 ECF No. 404.

13 **B. *Johnson v. United States* and subsequent challenges**

14 Stain filed his section 2255 motion in the wake of *Johnson v. United States*, 135 S. Ct.  
15 2551 (2015). There, the U.S. Supreme Court ruled that a portion of the Armed Career Criminal  
16 Act’s (“ACCA”) violent-felony definition, often referred to as the “residual clause,” was  
17 unconstitutionally vague (i.e., “void for vagueness”).<sup>4</sup> *Johnson*, 135 S. Ct. at 2557. The Supreme  
18 Court subsequently held that *Johnson* announced a new substantive rule that applied  
19 retroactively to cases on collateral review, *Welch v. United States*, 136 S. Ct. 1257 (2016), thus  
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21 <sup>3</sup> Because Stain had previously filed a section 2255 motion, which this court adjudicated, he  
22 applied to the Ninth Circuit Court of Appeals for leave to file a second or successive motion. *See*  
23 28 U.S.C. § 2255(h). The Ninth Circuit, however, denied the motion as unnecessary, holding that  
24 Stain had “not had a prior section 2255 motion adjudicated on the merits that challenged the  
25 second amended judgment” that this court entered after granting in part his original 2255 motion.  
*Stain v. United States*, No. 16-70648, ECF No. 2 (9th Cir. 2016).

26 <sup>4</sup> The ACCA applies to certain defendants charged with unlawful possession of a firearm under  
27 18 U.S.C. § 922(g). 18 U.S.C. § 924(e). Normally, a defendant convicted of unlawful possession  
28 of a firearm may be sentenced to a statutory maximum of 10-years of imprisonment. *Id.*  
§ 924(a)(2). However, if a defendant has three prior convictions that constitute either a “violent  
felony” or “serious drug offense,” the ACCA enhances the 10-year maximum sentence to a 15-  
year minimum sentence. *Id.* § 924(e)(1).

1 allowing defendants to challenge their ACCA convictions under section 2255. *See, e.g., United*  
2 *States v. Avery*, No. 3:02-CR-113-LRH-VPC, 2017 WL 29667 (D. Nev. Jan. 3, 2017).

3 Moreover, *Johnson* also sparked challenges to other federal criminal statutes and sections  
4 of the U.S. Sentencing Guidelines (“U.S.S.G.”) that incorporate a “crime-of-violence” definition  
5 that includes a residual clause similar or identical to the ACCA’s. One such case relevant to this  
6 motion is *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016).  
7 There, the Ninth Circuit addressed a challenge to the residual clause found in 18 U.S.C. § 16(b),  
8 which is similar but not identical to the ACCA’s residual clause. *Dimaya*, 803 F.3d at 1111–12.  
9 The court ultimately held that section 16(b)’s clause was also void for vagueness. *Id.* at 1119.

10 Last year, the U.S. Supreme Court granted certiorari in *Dimaya* and heard arguments in  
11 early 2017. *Lynch v. Dimaya*, 137 S. Ct. 31 (2016). However, instead of issuing a decision, the  
12 Court set the case for re-argument for its next term.

13 As the instant motion demonstrates, *Johnson* and *Dimaya* have also led to challenges to  
14 the residual clause found in 18 U.S.C. § 924(c), which is nearly identical to the section 16(b)  
15 residual clause that the Ninth Circuit held void for vagueness in *Dimaya*. While a challenge to  
16 section 924(c) is currently before the Ninth Circuit, the court has deferred ruling on the issue  
17 until the Supreme Court decides *Dimaya*. *United States v. Begay*, No. 14-10080, ECF No. 87  
18 (9th Cir. 2017); *see also United States v. Begay*, 2016 WL 1383556 (9th Cir. 2016).

## 19 **II. Legal standard**

20 Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or  
21 correct a sentence if “the sentence was imposed in violation of the Constitution or laws of the  
22 United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the  
23 sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral  
24 attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case  
25 conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to  
26 be served upon the United States attorney, grant a prompt hearing thereon, determine the issues  
27 and make findings of fact and conclusions of law with respect thereto.” *Id.* § 2255(b).

1 Section 2255 creates a one-year statute of limitations. *Id.* § 2255(f). When a petitioner  
2 seeks relief pursuant to a right recognized by a U.S. Supreme Court decision, the statute of  
3 limitations runs from “the date on which the right asserted was initially recognized by the . . .  
4 Court, if that right has been . . . made retroactively applicable to cases on collateral review . . . .”  
5 *Id.* § 2255(f)(3). The petitioner bears the burden of demonstrating that his petition is timely and  
6 that he is entitled to relief. *Ramos-Martinez v. United States*, 638 F.3d 315, 325 (1st Cir. 2011).

### 7 **III. Discussion**

8 Under 18 U.S.C. § 924(c)(1)(A), it is a felony to use or carry a firearm “during and in  
9 relation to any crime of violence . . . .” This statute therefore creates an offense separately  
10 punishable from another concurrently-charged offense that the indictment alleges is a crime of  
11 violence. Section 924(c) defines “crime of violence” as a felony that

12 (A) has as an element the use, attempted use, or threatened use of physical force  
13 against the person or property of another, or

14 (B) that by its nature, involves a substantial risk that physical force against the  
15 person or property of another may be used in the course of committing the  
16 offense.

17 18 U.S.C. § 924(c)(3). The first clause in this definition is commonly referred to as either the  
18 “force clause” or “elements clause,” while the second clause is the aforementioned residual  
19 clause. Because the definition is worded disjunctively, a felony need only categorically match<sup>5</sup>  
20 one of the two clauses in order to constitute a crime of violence and thus satisfy that element  
21 under section 924(c)(1)(A).

22 Here, the counts of Hobbs Act robbery and federal armed bank robbery (counts 2 and 4)  
23 served as the underlying crimes of violence for Stain’s two separate section 924(c) convictions

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24 <sup>5</sup> Courts apply the “categorical approach” in determining whether an offense constitutes a crime  
25 of violence under section 924(c). *See United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir.  
26 2006). Under the categorical approach, a court may only “compare the *elements* of the statute  
27 forming the basis of the defendant’s [prior] conviction [or concurrently-charged offense] with the  
28 elements of” a crime of violence. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013)  
(emphasis added); *see also United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016).  
Therefore, a court may not examine “[h]ow a given defendant actually perpetrated the crime—  
what [the Supreme Court has] referred to as the ‘underlying brute facts or means’ of  
commission . . . .” *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (citation omitted).

(counts 3 and 5). *See* ECF No. 171. The Hobbs Act “prohibits any robbery or extortion or attempt or conspiracy to rob or extort that ‘in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce.’” *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004) (quoting 18 U.S.C. §1951(a)). The statute defines robbery as follows:

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of **actual or threatened force, or violence, or fear of injury**, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1) (emphasis added).

Similarly, a person commits federal bank robbery when he, “by force and violence, or *by intimidation*, takes . . . any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.” 18 U.S.C. § 2113(a) (emphasis added). The offense entails a statutory maximum sentence of 20 years of imprisonment. *Id.*

If, however, a defendant, in committing a bank robbery, “assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device,” the maximum sentence is increased to 25 years. *Id.* § 2113(d). This enhancement applied to the instant case, as Stain was charged with and convicted of committing federal bank robbery by “assault[ing] and put[ting] in jeopardy the life of another person by the use of dangerous weapons . . . .” ECF No. 171 at 6; *see also* ECF No. 329 at 1.

Stain now challenges his section 924(c) convictions under section 2255, arguing that Hobbs Act robbery and federal bank robbery can no longer be considered crimes of violence under modern authority. He first contends that the court may not apply section 924(c)’s residual clause because it is void for vagueness in light of the U.S. Supreme Court’s decision in *Johnson* and the Ninth Circuit’s decision in *Dimaya*. He further argues that neither federal robbery statute is a categorical match for the force clause because they may be committed (1) through the use of nominal (i.e., less-than-violent) force and (2) through reckless and thus unintentional conduct.

1           Stain’s claim for relief is dependent on his argument that section 924(c)’s residual clause  
2 is void for vagueness. It is that premise that would allow Stain to collaterally attack his sentence  
3 under section 2255. However, this court need not reach this question because, even if the  
4 *residual* clause is void, this court has already held that Hobbs Act robbery and federal bank  
5 robbery both satisfy the *force* clause under 924(c) and are therefore crimes of violence. *United*  
6 *States v. Mendoza*, No. 2:16-CR-00324-LRH-GWF, 2017 WL 2200912 (D. Nev. May 19, 2017)  
7 (Hobbs Act robbery); *United States v. Wesley*, No. 3:16-CR-00024-LRH-VPC, 2017 WL  
8 1050587 (D. Nev. Mar. 20, 2017) (federal bank robbery). And because Stain has not raised any  
9 arguments that the court did not previously address, it will apply its holdings in *Mendoza* and  
10 *Wesley* to this case and deny his motion.

11           Nonetheless, the court will provide an overview of why both federal robbery crimes  
12 satisfy the force clause. The court will also address the partially unique issue raised in this  
13 motion by the application of the *armed* bank robbery enhancement under 18 U.S.C. § 2113(d).

14           **A. Ninth Circuit precedent forecloses Stain’s claim for relief**

15           As in *Mendoza* and *Wesley*, one of Stain’s primary arguments is that neither Hobbs Act  
16 robbery nor bank robbery comport with the force clause because the crimes may be committed,  
17 respectively, through “intimidation” and by instilling the “fear of injury” in the victim. He  
18 contends that a defendant may therefore commit these crimes without the actual or threatened  
19 use of violent force. ECF No. 404 at 19, 24. Stain, however, has failed to address the Ninth  
20 Circuit’s holdings in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990) and *United States v.*  
21 *Howard*, 650 F. App’x 466 (9th Cir. 2016).

22           As in this case, the defendant in *Howard* argued that Hobbs Act robbery is not a  
23 categorical match for section 924(c)’s force clause because the crime “may also be accomplished  
24 by putting someone in ‘fear of injury’ . . . .” *Howard*, 650 F. App’x at 468 (quoting 18 U.S.C. §  
25 1951(b)). The Ninth Circuit held that this argument was “unpersuasive and . . . foreclosed by”  
26 the court’s previous *published* decision in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990).

27           There, the court “held that the analogous federal bank robbery statute, which may be  
28 violated by ‘force and violence, or by *intimidation*’ qualifies as a crime of violence under

1 U.S.S.G. § 4B1.2, which uses the nearly identical definition of ‘crime of violence’ as § 924(c).”  
2 *Id.* (emphasis in original) (internal citation omitted) (citing *Selfa*, 918 F.2d at 751). The court  
3 explained “that ‘intimidation’ means willfully ‘to take, or attempt to take, in such a way that  
4 would put an ordinary, reasonable person *in fear of bodily harm*,’ which satisfies the requirement  
5 of a ‘threatened use of physical force’ under § 4B1.2.” *Id.* (emphasis in original) (quoting *Selfa*,  
6 918 F.2d at 751). The Ninth Circuit thus concluded that, “[b]ecause bank robbery by  
7 ‘intimidation’—which is defined as instilling fear of injury—qualifies as a crime of violence,  
8 Hobbs Act robbery by means of ‘fear of injury’ also qualifies as a crime of violence.” *Id.*

9 The Ninth Circuit’s holding in *Selfa* is binding on this court in regards to federal bank  
10 robbery. And although *Howard*, as an unpublished decision, is not binding in regards to Hobbs  
11 Act robbery, this court and numerous others throughout this district have found its reasoning  
12 persuasive and held that Hobbs Act robbery is a crime of violence. *See, e.g., Mendoza*, 2017 WL  
13 2200912; *United States v. Hayes*, No. 3:13-CR-00007-RCJ-WGC, 2017 WL 58578, at \*2 (D.  
14 Nev. Jan. 5, 2017); *United States v. Loper*, No. 2:14-CR-321-GMN-NJK, 2016 WL 4528959, at  
15 \*2 (D. Nev. Aug. 29, 2016); *United States v. Barrows*, No. 2:13-CR-00185-MMD-VCF, 2016  
16 WL 4010023, at \*3 (D. Nev. July 25, 2016).

17 Moreover, while other petitioners have argued that subsequent authority has effectively  
18 overruled *Selfa*, this court has rejected that contention. *Mendoza*, 2017 WL 2200912, at \*8 (D.  
19 Nev. May 19, 2017) (rejecting this *explicit* argument in regards to Hobbs Act robbery); *Wesley*,  
20 2017 WL 1050587, at \*3–4 (rejecting this *implicit* argument in regards to bank robbery).

21 **B. Stain has not established a realistic probability that a defendant**  
22 **can commit Hobbs Act robbery by using nominal force**

23 Stain argues that the Hobbs Act’s common-law origins demonstrate that a defendant can  
24 violate this federal statute through the use of nominal force.<sup>6</sup> ECF No. 404 at 14; *see United*

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25 <sup>6</sup> In *Johnson v. United States*, 559 U.S. 133 (2010) (“*Johnson 2010*”), the Supreme Court  
26 specified that the term “physical force” under the ACCA’s force clause “means *violent* force—  
27 that is, force capable of causing physical pain or injury to another person.” Thus, crimes that can  
28 be committed through the use of *nominal* force do *not* satisfy the ACCA’s force clause. *See, e.g.,*  
*United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016). This court and many others have also  
extended the violent-force requirement to section 924(c)’s force clause. *See Mendoza*, 2017 WL  
2200912, at \*4 n.5.

1 *States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958) (“‘Robbery’ under the Hobbs Act, is common  
2 law robbery . . . .”). This argument is premised on his broader contention that the degree of force  
3 a defendant used to commit common-law robbery was immaterial. Stain cites to modern  
4 secondary sources collecting state-law cases and ostensibly concluding that a defendant could  
5 commit common-law robbery through the use of nominal force. ECF No. 404 at 14–15.  
6 Moreover, he cites to federal decisions involving convictions under different federal robbery  
7 statutes through the use of seemingly nominal force. *Id.*

8 The court rejected these precise arguments in *Mendoza* and remains unpersuaded. 2017  
9 WL 2200912, at \*6–7. Relying in part on the thorough analysis conducted by another district  
10 court in *United States v. Pena*, 161 F. Supp. 3d 268 (S.D.N.Y. 2016), this court was unconvinced  
11 by the premise that even the slightest touch could satisfy the force element under common-law  
12 robbery. And even if this were not the case, the court was unpersuaded—and remains  
13 unpersuaded—that a defendant can commit Hobbs Act robbery through nominal force. This  
14 conclusion is underscored by the fact that Stain and similar petitioners are unable to cite a single  
15 instance from the over 70 years since the Hobbs Act’s enactment in which a defendant was  
16 convicted under the statute after having used or threatened to use nominal force.

17 Moreover, the court finds that there is no merit to Stain’s argument that, by threatening to  
18 harm a victim by use of poison or a hazardous chemical, a defendant can commit Hobbs Act  
19 robbery without the use of violent force. He contends that neither means of commission  
20 constitutes violent force under the holdings in *United States v. Torres-Miguel*, 701 F.3d 165 (4th  
21 Cir. 2012) and *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005). ECF No. 404  
22 at 17.

23 However, many courts have recognized that the reasoning in both cases has been  
24 critically undermined by the Supreme Court’s holding in *United States v. Castleman*, 134 S. Ct.  
25 1405 (2014). *See, e.g., United States v. Taylor*, 206 F. Supp. 3d 1148, 1165 (E.D. Va. 2016)  
26 (citing cases); *Pikyavit v. United States*, No. 2:06-CR-407-PGC, 2017 WL 1288559, at \*7 (D.  
27 Utah Apr. 6, 2017). There, in the context of a domestic-violence statute, the Court rejected the  
28 argument that the use of poison would not entail “the use or attempted use of physical force.”

1 *Castleman*, 134 S. Ct. at 1407. It reasoned that “[t]he ‘use of force’ . . . is not the act of  
2 ‘sprinkl[ing]’ the poison; it is the act of employing poison knowingly *as a device to cause*  
3 *physical harm*. That the harm occurs indirectly, rather than directly (as with a kick or punch),  
4 does not matter.” *Id.* at 1415 (emphasis added).

5 Accordingly, Stain has failed to demonstrate a realistic probability that a defendant can  
6 commit Hobbs Act robbery through the use of nominal force. *See Gonzales v. Duenas-Alvarez*,  
7 549 U.S. 183, 193 (2007) (requiring “a realistic probability, not a theoretical possibility,” that a  
8 statute would apply to conduct *not* encompassed by the crime-of-violence definition).

9 **C. Both federal robbery crimes require *intentional* conduct**

10 The court is also unpersuaded by Stain’s argument that, under the intimidation and fear-  
11 of-injury elements, a defendant may commit either federal robbery crime through reckless,  
12 unintentional conduct.<sup>7</sup> Like the defendants in *Mendoza* and *Wesley*, Stain contends that cases  
13 addressing the intimidation element under federal bank robbery demonstrate this point. For  
14 instance, he relies in part on the Ninth Circuit’s decision in *United States v. Foppe*, 993  
15 F.3d 1444 (9th Cir. 1993), where the court held that, under the federal-bank-robbery statute, it is  
16 “irrelevant” whether the defendant “specifically intended to intimidate” the victim.

17 However, the *Foppe* court merely held that federal bank robbery “is a general intent  
18 crime, not a specific intent crime[.]” in response to the defendant’s argument that he never  
19 intended to intimidate the bank teller that he approached. *Foppe*, 993 F.3d at 1451. Moreover, in  
20 previously rejecting this argument, this court again relied in part on the *Pena* court’s analysis.  
21 There, the court rejected an identical argument by citing a Supreme Court case that specified that  
22 federal bank robbery “is a general intent crime whose *mens rea* requirement is satisfied only if  
23 the ‘defendant possessed knowledge with respect to the *actus reus* of the crime ([i.e.,] the taking  
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25 <sup>7</sup> This point is relevant to finding that both robbery crimes are crimes of violence because, in  
26 order to satisfy the force clause, the use of force [required by a statute] must be intentional, not  
27 just reckless or negligent.” *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (citing  
28 *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010)). Because this requirement was  
recognized only several years after *Selfa*, the contention that both robbery crimes may be  
committed unintentionally is often asserted in support of the argument that *Selfa* has been  
effectively overruled. *See, e.g., Mendoza*, 2017 WL 2200912, at \*4–5.

1 of property of another by force and violence or intimidation).” *Pena*, 161 F. Supp. 3d at 283  
2 (quoting *Carter v. United States*, 530 U.S. 255, 268 (2000)).

3 “In other words, a defendant charged with bank robbery . . . must intentionally perform  
4 objectively intimidating actions in the course of unlawfully taking the property of another.” *Id.*  
5 Thus, “if a defendant robs a bank with violence, the prosecution need not prove a specific intent  
6 to cause pain or to induce compliance.” *Id.* “Similarly, if a defendant robs a bank with  
7 intimidation, the prosecution need not prove a specific intent to cause fear[,]” which “does not  
8 mean that the bank robbery was accomplished through ‘negligent or merely accidental  
9 conduct.’” *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)).

10 This court remains convinced by this reasoning and finds that it applies to both robbery  
11 crimes. Accordingly, the court finds that Hobbs Act robbery and federal bank robbery satisfy  
12 section 924(c)’s force clause and are therefore crimes of violence regardless of whether the  
13 residual clause is void for vagueness.

14 **D. Armed bank robbery is also a crime of violence**

15 Finally, Stain argues that the enhancement under section 2113(d) for committing bank  
16 robbery by assaulting a person or placing another person’s life in jeopardy by use of a dangerous  
17 weapon does not transform the base offense into a crime of violence. ECF No. 404 at 27. The  
18 court need not reach this question in this case because it has already found that bank robbery  
19 under section 2113(a) is a crime of violence. Nonetheless, the court will address this issue for the  
20 sake of thoroughness.

21 First, Stain argues that a defendant can trigger either variation of the enhancement  
22 without violent force. ECF No. 404 at 27. This argument, however, is once again premised on  
23 the holdings in *Torres-Miguel* and *Perez-Vargas* regarding the use of poison or hazardous  
24 chemicals, which this court rejected in light of the Supreme Court’s ruling in *Castleman*. For the  
25 same reasons discussed above, the court finds that this argument is without merit.

26 Stain also contends that section 2113(d) does not require an *intent* to threaten or use  
27 violent force. ECF No. 404 at 28. He argues that a defendant can trigger the enhancement by  
28 merely brandishing a firearm without an intent to intimidate another person. However, this

1 argument merely recycles Stain's contention that intimidation may result from reckless conduct.  
2 The court therefore similarly rejects this argument, as brandishing a firearm in the context of a  
3 robbery is objectively intimidating and committed with the intent to depose a bank of the  
4 property in its care and custody.

5 Accordingly, it is clear that committing armed bank robbery under section 2113(d) is a  
6 crime of violence.

#### 7 **E. Certificate of appealability**

8 Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "an  
9 appeal may not be taken to the court of appeals from . . . the final order in a proceeding under  
10 section 2255" unless a district court issues a certificate of appealability based on "a substantial  
11 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(B). "The petitioner must  
12 demonstrate that reasonable jurists would find the district court's assessment of the constitutional  
13 claims debatable or wrong. To meet this threshold inquiry, the petitioner must demonstrate that  
14 the issues are debatable among jurists of reason; that a court could resolve the issues in a  
15 different manner; or that the questions are adequate to deserve encouragement to proceed  
16 further." *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006) (internal citations, quotation marks,  
17 and brackets omitted).

18 Because this section 2255 motion involves questions of law that are partially unsettled  
19 and are currently being addressed by higher courts, this court will issue a certificate of  
20 appealability.

#### 21 **IV. Conclusion**

22 IT IS THEREFORE ORDERED that petitioner Edward Stain's motion to vacate, set  
23 aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 404) is **DENIED**.

24 IT IS FURTHER ORDERED that Stain's abridged motion to vacate, set aside, or correct  
25 his sentence (ECF No. 397) is **DENIED**.


26 IT IS FURTHER ORDERED that Stain's motion for reconsideration in sentencing  
27 pursuant to 3742(a)(1) and (2) (ECF No. 384) is **DENIED**.

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IT IS FURTHER ORDERED that Stain is **GRANTED** a certificate of appealability.  
IT IS SO ORDERED.

DATED this 12th day of July, 2017.

  
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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE